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Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
NOV 16 1906
JAMES H. McKENNEY,
CLERK.

No. 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES S. BADGLEY.

BRIEF FOR DEFENDANTS IN ERROR.

HENRY J. HERSEY,
Counsel for Defendants in Error.

(19,931)

Smith-Brooks Printing Co. Press, Denver.

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CHARLES S. ELDER, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of George Stidger, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of Charles W. Badgley.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

While the statement of the case in the brief of the plaintiff in error is substantially correct, yet we deem it best to call the attention of the court to some further matters, and to correct counsel's statement as to our contentions below.

It is not in the record, but it is the fact, as stated by counsel in their brief, that Mr. Elder had been a candidate for the office of treasurer of the city and county of Denver at a prior election, held May 17, 1904, pursuant to the city charter of the city and county of Denver, had received a certificate of elec-

tion to said office, qualified and assumed the office on June 1, 1904, the time fixed by the charter; Mr. Badgley was not a candidate at that election.

In the complaint filed in the District Court of the second judicial district of the state of Colorado, it is alleged, among other things, that Charles S. Elder, the plaintiff in error here, was a candidate for the office of treasurer of the city and county of Denver at the general election for state, county and precinct officers under and by virtue of the Constitution and statutes of Colorado, held on November 8, 1904, and that the relator below, Charles W. Badgley, was a candidate for the same office at the same election. (Printed Transcript of Record, page 2.)

The complaint alleges that Badgley received the highest number of votes cast at said election, the canvass of the votes, the issuance of a certificate of election to Badgley, his qualifying and demand on Elder for the possession of the office, etc., and Elder's refusal. (Printed Transcript of Record, pages 2-5.) To this complaint Elder filed a general demurrer, which was sustained by the District Court, whereupon we elected to abide by our complaint, and the cause was dismissed and judgment for costs given to Elder. (Printed Transcript of Record, pages 6 and 7.)

Badgley claimed title to the office of treasurer, as shown by the complaint, by reason of the election thereto on November 8, 1904, the time fixed by the Constitution of Colorado (section 6 of article XIV hereinafter set out in full), while Elder claimed title by reason of the election of May 17, 1904, the time fixed by the local charter of Denver, which charter was not enacted by the general assembly, but adopted

on March 29, 1904, by popular vote of the electors of Denver after having been framed by a charter convention assuming to act under an amendment to the Constitution known as article XX. Inasmuch as Elder attempted to justify by general demurrer, instead of by answer, as he should have done, the charter was not pleaded by him as a defense or justification to the quo warranto proceedings. However, without any ruling upon the question of whether the court could or would take judicial notice of the charter, the provisions of the charter, relied upon by Elder, were referred to in argument in both courts below and considered by the courts.

Upon the dismissal of our complaint in the District Court and the entry of judgment for costs against us we appealed to the Supreme Court of Colorado, and such proceedings were had there that the judgment of the District Court was reversed and final judgment entered in our favor in the Supreme Court.

The judgment in the Supreme Court of Colorado was not only one of ouster in which the people were interested, but also one adjudging the relator, Charles W. Badgley, to be the lawfully elected and duly qualified county treasurer of the city and county of Denver, and entitled to hold and exercise the said office and to perform the duties thereof, and receive the emoluments thereof for the term of two years commencing on the 10th day of January, A. D. 1905, and requiring the defendant to forthwith yield and deliver the office to the said Badgley, and all the books, records, etc., belonging thereto, and for costs.

Counsel for plaintiff in error, at pages 13 to 15 of their brief, in attempting to give the contentions

of the defendants in error in the District and Supreme Courts, neither accurately nor fully state them.

We have never contended that section 2 of article XX of the Constitution of the state of Colorado was, or is, invalid, because of any conflict with the enabling act of congress, or any section or article of the Constitution of the United States, nor, as we understand it, did the Supreme Court of Colorado so decide, but, on the contrary, based its decision on other grounds. Our principal contentions were, and are, that the provisions of the charter of the city and county of Denver, upon which plaintiff in error relies to support his claim to the office of county treasurer, are in conflict with the Constitution of Colorado, and so unconstitutional and void. We did, however, by way of argument, say that, if the construction claimed by Mr. Elder were given, it would result in a conflict with the enabling act and the Federal Constitution.

This case was one of eight cases of like character pending in the Supreme Court of Colorado, and all finally decided at the same time, involving the title to the following county offices in the city and county of Denver, to wit: County judge, county assessor, county clerk and *ex officio* recorder, treasurer, sheriff, county commissioners, justices of the peace and constables. (Printed transcript of Record, page 22.)

The county judge case was an original proceeding in quo warranto in the Supreme Court, while the other seven were proceedings of the same character (though brought under chapter 27 of the Civil Code of Procedure), but pending in the Supreme Court on appeal or error from the District Court.

The opinion in the county judge case gives the reasons of the court for the several judgments rendered in the several cases, and is attached to the record here and printed in the transcript of record at pages 21 to 32. In that opinion our contentions below are correctly and succintly stated by the court as follows:

> "It is the contention of the relator that the charter convention of the city and county of Denver, provided for by article XX, can not legislate in any particular as to the county court, or the county judge, or any other office, officer or matter, not of purely local or municipal concern; that the Constitution provides for one county judge in each county of the state, and requires that all laws relating to courts shall be general and of uniform operation throughout the state, and that the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, shall be uniform (Const., Art. VI., sections 22, 28); that the charter provisions assuming to increase the number of county judges of the city and county of Denver, to change the time of election of the county judge and time of the beginning and ending of his term, and to legislate in any particular as to the county judge of the county court are unconstitutional and void; that there is nothing in article XX of the Constitution which shows an intention to change the scheme of government in this particular, and

> if there were, it would be unconstitutional; and that there is nothing in article XX which shows any intention to grant any power to the charter convention to supersede the provisions of the Constitution or general statutes relating to the county or the state government, and, therefore, if the charter convention has legislated or attempted to legislate upon any matter which supersedes the provisions of the Constitution or general statutes, such legislation is unconstitutional and void." (Printed Transcript of Record, page 23.)

It will be seen from this quotation that the real questions involved, and our main contentions below, were materially different from those stated in counsel's brief, and that they related to the proper construction of the Colorado Constitution and to the powers vested in the city and county of Denver, and did not raise federal questions.

ARGUMENT.

In my presentation of the argument here I shall divide it into two main subdivisions as follows:

I. That this court has no jurisdiction to review the judgment of the Supreme Court of Colorado, because no federal questions were involved in the cause below, or, at least, not necessarily involved, as there was other matter adjudged by the court below broad enough to sustain the judgment, and because, if it

should be considered that the decision was upon a federal question, the judgment was in favor of the federal authority claimed and not against it, and so the national government has been fully protected in the exercise of its rightful powers, and so the writ of error should be dismissed and the judgment affirmed.

II. That, if this court should determine that it has jurisdiction to review the judgment of the court below, the judgment was right and should be affirmed, because, under the Colorado Constitution the charter of the city and county of Denver can not legislate upon any matters affecting the policy of the state at large or intrenching upon county or state government, but only upon such subjects as are distinctly local and municipal in character, as it is the exclusive function of the general assembly to legislate upon all matters affecting the policies of the state and state or county government. There are, however, other less important reasons given and discussed under this subdivision later in this brief.

I.

AS TO THE QUESTION OF JURISDICTION.

It is apparent from the statement of the Supreme Court of Colorado of our contentions below (Printed Transcript of Record, page 23) which has been quoted above in our statement of the case, and from the opinion of the court below, that the questions involved were non-federal and related solely to the proper construction of the Colorado Constitution, not only of article XX, but also of article XIV and other articles.

Immediately following that statement by the court of the questions involved below, the court says:

> "In our opinion the contention of relator is fully sustained by the majority opinion of the court in People v. Sours, 31 Colo., 369, and in the opinion of the present chief justice specially concurring." (Printed Transcript of Record, page 23.)

This is followed in the opinion by quotations from the opinion in People v. Sours, 31 Colo., 369, and also from another opinion by the same court on the same subject in Parsons v. People, 32 Colo., 221, showing the same holding as in People v. Sours, and the Supreme Court says:

> "We might, without further discussion, conclude this opinion at this point, basing our conclusions upon the ground that the question here presented, under the authorities above cited, is not an open one, but is, and must be held to be, *stare decisis.*" (Printed Transcript of Record, page 26.)

So it is apparent that the essential and material part of the decision of the Supreme Court of Colorado stops here, and the judgment was rendered against the plaintiff in error because by the decision in People ex rel. Elder v. Sours, 31 Colo., 369 (in which case plaintiff in error here was relator), all the questions involved had been decided (in accordance with his contentions at that time), and that decision had been followed in later ones by the Supreme Court, and so the question presented in this case below was

no longer an open one, "but is and must be held to be *stare decisis.*"

However, in deference to the ability and learning of opposing counsel, our Supreme Court, as it expressly stated, then went on to give counsel's position and argument, and to "point out what the court deemed to be the fallacy of both position and argument," and the rest of the opinion is given up to that exposition.

It is upon that portion of the opinion that counsel seek to predicate error, and of which they complain here. In other words, they do not claim error in the real judgment, or in the material parts of the decision, but only in the *obiter dicta* contained in the opinion.

This, we think, does not confer jurisdiction upon this court, as it was not decisive of the issues, and there was other matter adjudged by the court below broad enough to sustain the judgment.

As was recently held by this court:

> "In every case which comes to this court on writ of error or appeal, the question of jurisdiction must first be answered, whether propounded by counsel or not."
>
> Giles v. Teasley, 193 U. S., 146, 160.

This is recognized by counsel for plaintiff in error, for, without waiting for a motion to dismiss to be filed, they begin their brief with a discussion of the question of jurisdiction.

It is also recognized by counsel for plaintiff in error that, on error from a judgment of a Supreme

Court of a state, they must make the strongest showing possible that a Federal question is involved, for in such cases the term "Federal question" has its narrowest meaning. But they are utterly unable to point out where any Federal question was necessarily involved in the case below. The only part of the opinion that they refer to is the argumentative portion which exposes 'the fallacy of both their position and argument.' This is of no more effect in conferring jurisdiction on this court than arguments of counsel, which this court has always held could not be resorted to for the purpose of showing that a question of Federal cognizance was decided by the state court.

Gibson v. Chouteau, 8 Wall., 314.

Sayward v. Denny, 158 U. S., 180.

The opinion of the Supreme Court of Colorado shows conclusively that the questions decided below were those relating to the conflict between the provisions of the charter of the city and county of Denver, a municipal corporation, and the state Constitution. Such questions and the decisions thereon are not reviewable by this court.

Kipley v. Illinois, 170 U: S., 182.

Missouri v. Dockery, 191 U. S., 165.

There are many Federal questions even upon which the state courts can pass and over which the Federal courts have no right of review, such, for example, as the mere construction, either of Federal or state laws.

Cook Co. v. Dock Co., 138 U. S., 635.

Osborne v. Florida, 164 U. S., 650.

Kennard v. Nebraska, 186 U. S., 304.

It will be seen by reading the opinion complained of (Printed Transcript of Record, pages 21 and 32) that even were a Federal question involved and decided by the state court yet the decision against the plaintiff in error was also based upon independent grounds, not involving a Federal question, which were broad enough to sustain the judgment. Under such circumstances this court has uniformly dismissed the writ of error without considering the Federal question, because it has no jurisdiction.

> Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co., 14 Wall., 23.
>
> Eustis v. Bolles, 150 U. S., 361.
>
> Giles v. Teasley, 193 U. S., 146.

The question involved below, upon which the case was decided and which was broad enough to sustain the judgment independent of any Federal question, was whether, under the Colorado Constitution, the charter of Denver could legislate as to the county treasurer and other county officers, conceded by plaintiff in error, as the opinion says, to be "*state officers*, in that they derive their existence and powers from the Constitution and general laws and perform state and governmental functions." (Printed Transcript of Record, page 26.) In other words, the question was, Did the Colorado Constitution delegate to the municipality of Denver the complete sovereign powers of the state for that locality, or did it merely grant to Denver freedom to legislate as to those matters purely of local and municipal concern?

The Supreme Court answered the former in the negative and the latter in the affirmative, and so gave

judgment against the plaintiff in error and thereby merely interpreted its own Constitution.

Even if we should accept the proposition of counsel for plaintiff in error that the opinion of the state court, holding that the charter provisions relied on were unconstitutional was in effect a decision that they were repugnant to the Constitution and laws of the United States, yet that would not give this court jurisdiction to review, because not only is the charter in this instance not a state statute, but, if it were, the decision was *against* its validity. It is only when the decision is in favor of the validity of a state statute which is claimed to deprive a party of his rights under the federal Constitution and laws that this court has jurisdiction.

Commonwealth Bank v. Griffith, 14 Pet., 56.

Phoenix Ins. Co. v. Gardiner, 11 Wall., 204.

Missouri v. Andriano, 138 U. S., 496.

Whitten v. Tomlinson, 160 U. S., 231.

Nor is a Federal question sufficiently shown by the fact that a state court, while declaring a statute to be in violation of the Federal Constitution, yet by its judgment gave effect to it when the decision of the Federal question was not an essential element in determining the right adjudicated.

Rutland R. R. Co. v. Central Vermont R. R. Co., 159 U. S., 630.

It is well settled that in order to raise a Federal question general references to the Federal Constitution or even to specific articles of the Constitution

are not sufficient. It is only by the most general references that plaintiff in error attempts to point out the alleged violation of the Federal Constitution.

Chapin v. Fye, 179 U. S., 127.
Clarke v. McDade, 165 U. S., 168.

Moreover, we shall search the record in vain in an endeavor to find anything showing that any Federal question was raised and decided below. The fact that plaintiff in error in his assignment of errors has sought to raise Federal questions can not help him. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised and properly raised in the court below and rulings asked thereon, so as to give this court jurisdiction.

Cornell v. Green, 163 U. S., 75.
Fowler v. Lamson, 164 U. S., 252.

We should at least expect to find an exception saved by plaintiff in error to the judgment below specially raising the alleged Federal question, but we do not. He does not even embody in the record his petition to the Supreme Court of Colorado for a rehearing, though he does insert (Printed Transcript of Record, pages 18-19), the final judgment which contains a recital that the cause came on to be heard upon his petition for a rehearing, and that the judgment theretofore entered was modified to the extent, as it appears from a comparison of the judgments, of causing final judgment to be entered in the Supreme Court instead of simply reversing the judgment of District Court and remanding the cause

with instructions to the District Court to overrule his demurrer. (Printed Transcript of Record, pages 18-19.)

Neither is the charter of the city and county of Denver found anywhere in the record. It is not a general statute of the state of Colorado, but merely a local, municipal charter, adopted by popular vote after being framed by a local charter convention. How can this court judicially know what the provisions of that charter, which the Supreme Court of Colorado passed upon, are? and how, therefore, can this court know whether the Supreme Court of Colorado correctly decided the question below or not?

It would seem that this case is either one of those in which, "under the settled rule in this court," the writ of error must be dismissed because "the Federal question asserted is manifestly lacking all color of merit" (Wabash R. Co. v. Flannigan, 192 U. S., 29, 38), or one in which the Federal question asserted was not, in the sense which would give this court jurisdiction, raised or involved below.

City of New Orleans v. New Orleans W. Co., 142 U. S., 79.

As has been said by this court in another case:

> "The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and the Constitution of the state, excepting in so far as they may be protected by any provision of the Federal Constitution.

"Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of a state this court follows the construction given to those instruments by the highest court of the state. The exceptions to this rule do not embrace the case now before us."

Wilson v. State of North Carolina ex rel. Caldwell, 169 U. S., 586, 592.

We respectfully submit that the writ of error ought to be dismissed and the judgment affirmed.

II.

AS TO THE MERITS OF THE CONTROVERSY.

The second subdivision of our brief is only necessary to be considered in the event that this court shall be of the opinion that it has jurisdiction and ought to examine into and determine the merits of the controversy.

I am firmly convinced that no federal question is involved herein in such sense as to give this court jursdiction of this cause. While the Colorado Supreme Court, in its opinion, referred to certain provisions of the federal Constitution, yet these were not decisive of the issues, and the judgment of the court was based not upon the question whether the federal Constitution was violated, but upon the question whether the provisions of the charter of the city

and county of Denver, relied upon by the plaintiff in error, were in conflict with the Colorado Constitution.

After able and exhaustive briefs and argument, not only by the learned counsel for the plaintiff in error here, but by numerous other able counsel representing other parties in some seven other cases, involving exactly the same questions, the Supreme Court of Colorado held that the charter provisions involved were unconstitutional, because in conflict with the Colorado Constitution, and that article XX of the Colorado Constitution did not confer upon this, or any charter convention, the power to legislate upon any subject, except such as was purely of local and municipal concern, and that under the Constitution of Colorado the county treasurers of all the counties of the state, including the city and county of Denver, as well as the other county officers designated in section 8 of article XIV, must be elected at the election in November, 1904, and biennially thereafter, and that the election of the plaintiff in error as treasurer at the election held in Denver on May 17, 1904, under the local charter, was illegal and void so far as it concerned the office of county treasurer. Upon the question whether or not the plaintiff in error is the city treasurer (as distinguished from county treasurer) the Supreme Court made no judgment, and we are therefore not now concerned with that.

The judgment of the Supreme Court of Colorado was therefore based on the construction of the Colorado Constitution, and under the decisions of this court that construction is binding even upon this, our highest and most distinguished court. However, as counsel for plaintiff in error in subdivision VI, from page 43 to page 76 of their brief, have discussed the

proposition as to whether or not the Supreme Court of Colorado correctly construed the Colorado Constitution, using nearly one-half of the space of their brief on that subject, I feel that it is incumbent upon me to reply to their argument on this phase of the case below.

UNDER THE COLORADO CONSTITUTION THE CHARTER OF THE CITY AND COUNTY OF DENVER CAN LEGISLATE ONLY AS TO THOSE MATTERS WHICH ARE DISTINCTLY LOCAL AND MUNICIPAL IN CHARACTER, AND CAN NOT THEREFORE LEGISLATE UPON ANY MATTERS AFFECTING THE POLICY OF THE STATE AT LARGE OR INTRENCH UPON COUNTY OR STATE GOVERNMENT, AS IT IS THE EXCLUSIVE FUNCTION OF THE GENERAL ASSEMBLY TO LEGISLATE UPON THE LATTER SUBJECTS.

Our contention, simply and concisely stated, is that neither article XX, nor any other portion of the Constitution of Colorado, anywhere expressly, or even by necessary implication, authorizes the charter of the city and county of Denver to legislate as to county officers, the time of their election, the term of their offices, their duties, etc.; that under the Colorado Constitution there is still to be elected and to serve in the city and county of Denver a county treasurer (as well as all other county officers so called), at the times and for the terms fixed by the Constitution for all counties in the state. In short, that under the

Colorado Constitution the charter of the city and county of Denver can only constitutionally legislate upon those matters which are distinctly local and municipal in character, and can not intrench upon county or state government.

This case is one of ten cases which were brought in January, 1905, in the District Court of the city and county of Denver, of like character, affecting the title to the other county offices, namely: Sheriff, treasurer, assessor, coroner, clerk, recorder, county superintendent of schools, justices of the peace and county commissioners; eight of them were taken to the Supreme Court, and six of them were finally decided at the same time the case at bar was. The amendment of section 8 of article XIV of the Constitution, as adopted at the November election, 1902, at the same time the amendment to the Colorado Constitution known as article XX was adopted, provides as follows:

> "*There shall be elected in each county* at the same time at which members of the general assembly are elected, *commencing in the year nineteen hundred and four,* one county clerk, who shall be ex officio recorder of deeds and clerk of the board of county commissioners; one sheriff; one coroner; *one treasurer,* who shall be collector of taxes; one county superintendent of schools; one county surveyor; one county assessor, and one county attorney, who may be elected, or appointed, as shall be provided by law; and such officers shall be paid such salary or compensation, either from the fees,

perquisites and emoluments of their respective offices, or from the general county fund, as may be provided by law. The term of office of all such officials that expire in January, 1904, is hereby extended to the second Tuesday in January, A. D. 1905. This section shall govern, except as hereafter otherwise expressly directed or permitted by constitutional enactment."

Colorado Constitution, section 8, article XIV.

3 Mills' Annotated Statutes of Colorado (Revised Supplement), section 483, page 37.

The contention of the defendants in error is, that this section is applicable to the city and county of Denver the same as it is to every other county in the state, and that it required the election of each one of the officers enumerated in the foregoing section at the general election on November 8, 1904, and that the term of office of the officers so elected began on January 10, A. D. 1905, and continues for two years thereafter, and that there is nothing in article XX of the Colorado Constitution that expressly provides for a different scheme of county government in the city and county of Denver from that provided for each and every other county in the state by this section and other sections of the Colorado Constitution not necessary to enumerate now; that the provisions of the charter framed by a charter convention of the city and county of Denver (elected in pursuance of article XX of the Colorado Constitution) and adopted by popular vote under the same ar-

ticle, providing for the election of a county treasurer and other county officers on May 17, 1904, and fixing the term of office for four years beginning on the 1st day of June, A. D. 1904, are therefore unconstitutional and void, and the claim of the plaintiff in error to the title to the office of county treasurer, by virtue of the May election in 1904, held in accordance with such charter provisions, but, as we contend, in violation of the Constitution and General Statutes of Colorado, is not well founded, and can not be sustained.

In short, it is the contention of the people and of the relator Badgley, the defendants in error here, that the charter of the city and county of Denver can not legislate in any particular as to the time of election, term of office, or jurisdiction, or duties of those officers commonly known as county officers, and particularly of county treasurer, or on any other matter not of purely local or municipal concern; that the Colorado Constitution provided for the election of a county treasurer in each county of the state on November 8, 1904, and every two years thereafter, and fixed the term of office for such county treasurer at two years from January 10, A. D. 1905; that the charter provisions assuming to provide a different and longer term and another and different time of election for the county treasurer in the city and county of Denver than that provided for in other counties of the state are unconstitutional and void.

In this discussion, certain fundamental principles must be borne in mind:

First. That under our system of government, the Constitution of a state is not a grant of power to the general assembly, but, on the contrary, is

merely a limitation upon its power, and that the general assembly has plenary power to pass any and all laws not expressly prohibited by the Constitution, or necessarily implied as prohibited by reason of anything therein contained.

Second. That this construction does not apply to municipal corporations or to the legislative bodies of municipal corporations.

Third. That it therefore follows that unless the Colorado Constitution expressly authorizes the charter-making power of the city and county of Denver to legislate in a given matter, then the power to so legislate does not exist. In short, whatever authority the charter convention possessed was derived entirely from an *express* grant contained in article XX of the Colorado Constitution.

In this connection it is well to remember that *the charter convention was called into existence solely and wholly by virtue of article XX,* which determined and limited its functions, powers and duties, *and that it possessed no such plenary power as is vested in the general assembly.*

Section 4 of article XX of our Colorado Constitution provides that:

> "The charter and ordinances of the city of Denver, as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have exclusive power

in making, altering, revising or amending their charter."

Colorado Constitution, section 4, article XX.

3 Mills' Annotated Statutes of Colorado (Rev. Suppl.), section 528-d, page 46.

It is not provided that the people of Denver may make, alter, revise or amend the statutes or general laws of the state, but only "their charter."

It then goes on to provide for the election of delegates to a charter convention, "who shall constitute a charter convention to frame *a charter* for said city and county in harmony with this amendment." It further provides that if such charter shall be approved by a majority of those voting thereon, it shall be certified to the secretary of state, "whereupon *it shall become the* CHARTER *of the said city and county of Denver and shall become the organic law thereof, and* SUPERSEDE ANY EXISTING CHARTERS *and amendments thereof.*"

Colorado Constitution, section 4, article, XX.

3 Mills' Annotated Statutes of Colorado (Rev. Suppl.), section 528-d, page 47.

The word "charter," as used here, must be construed in its ordinary meaning, as words in the Constitution must be understood to have been used in their natural sense.

Carpenter v. People, 8 Colo., 116, 125.

Alexander v. People, 7 Colo., 155, 165.

People v. May, 9 Colo., 80, 85.

As we shall show later the word "charter" as here used is not synonymous with "law."

McMurray et al v. Wright, Mayor, et al.,
19 Colo. App., 17, 26, 27.

Denver has always (prior to March 29, 1904, when the present charter was adopted by local vote under said article XX) existed under a special charter enacted by the general assembly, and the charter framed by the last charter convention and approved by vote of the majority of the electors is but the successor of the previous charter (Parsons vs. People, 32 Colo., 221, [illegible] and can properly legislate only upon those [illegible] which are distinctly municipal and ordina[illegible]roper for municipal legislation, as distinguished from those matters which relate to county or state government and which concern the people or policy of the state at large.

It should be particularly noticed that there is nothing in article XX, relating to what the new charter shall provide, which shows any intention to grant any power to the charter convention to supersede the provisions of the Constitution or general statutes relating to the county or state government. Indeed, the only language in article XX, showing that the new charter should supersede anything, is that which states that it shall "supersede any existing *charters* and amendments thereof."

If it was the intention for this article of the Colorado Constitution to authorize the charter convention to make any provision which should supersede any existing general statutes, it would at this point have been expressly stated that such charter should super-

sede not only the existing charters and the amendments thereto, but that it should also supersede the general statutes.

This statement is in entire harmony with the previous decisions of the Colorado Supreme Court interpreting article XX.

For the full text of article XX of the Colorado Constitution, see

> 3 Mills' Annotated Statutes of Colorado (Revised Supplement), sections 528-a to 528-h, pages 43-51.
>
> Colorado Session Laws of 1901, chapter 46, pages 97-106.

Mr. Justice Steele of the Colorado Supreme Court, in sustaining article XX, and giving the majority opinion of the court, in answer to certain objections raised by counsel for respondent against the constitutionality of article XX, clearly and unequivocally sustains the principle herein contended for. He says:

> "Counsel say: 'Had it been the intention that the Constitution and laws should be in force in this territory, this instrument would have so stated. The language of the above provisions is plain and unambiguous. It has been said that in construing a constitutional provision it will be presumed that every word was weighed and its meaning carefully considered before its insertion in the instrument; and this instrument says that the city and county of Denver can adopt any measure, and shall always have the exclusive power to make, alter and revise their

charter. That means everything. If not, why not? This charter is to be the organic law. A legislative act is now the charter of the city of Denver, and the Constitution of this state and the laws thereof constitute the organic law of this county. But this instrument changes all this, and says that the charter as framed by the charter convention shall not only be the charter of the city and county, but shall be the organic law thereof. That language means something. It displaces, and was intended to displace, the Constitution, the laws, and the general assembly.'

"If this amendment must be given that construction, it can not be sustained. Even by constitutional amendment, the people can not set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city government. The duties of judges of the District Court, county judges, district attorneys, justices of the peace, and, generally of county officers, are mainly governmental; and, so far as they are governmental, they may not be controlled by other than state agencies without undermining the very foundation of our government. *Under the*

Constitution of the United States, the state government must be preserved throughout the entire state; and it can be preserved only by having within every political subdivision of the state, such officers as may be necessary to perform the duties assumed by the state government under the general laws as they now exist, or as they may hereafter exist.

"*This distinction* between the governmental duties of public officers and their municipal duties *is fundamental, and therefore is not avoided or affected by the consolidation.*

" 'Counties, townships, school districts and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the state which apportion the territory of the state into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the state; and in order that they may be able to perform those duties, vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; *the legislature assumes this division of the state to be essential in republican government,* and the duties are imposed as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional lib-

erty.'—Cooley's Constitutional Limitations, 240.*

"'*A municipal corporation proper is created mainly for* the interest, advantage and convenience of the *locality* and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. *With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.*'—1 Dillon's Municipal Corporations, section 23.

"The respondent's construction, however, is not that placed upon the amendment by counsel for the petitioners, or, we assume, by the people. The provision that 'Every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable,' *completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control. The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver*

absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States."

People ex rel. Elder, as Treasurer of the City and County of Denver v. Sours, 31 Colo., 369, 385-387.

Mr. Justice Gabbert, of the same court, in a specially concurring opinion, shows also that the court viewed the amendment as relating solely to matters of municipal government as distinguished from county or state government, for he says:

" * * * *the whole scope and purpose* of the amendment *was to provide home rule for certain cities with respect to certain governmental matters local in their nature.* This is apparent from the contents of the amendment itself, as well as the provisions designating what should appear upon the official ballot in order to enable the electors to vote for or against its adoption. *Its several provisions all relate to this one general object, and are designed to accomplish this one purpose,* in so far as they *relate to cities designated in the amendment either by name or class."*

People ex rel. Elder, Etc., v. Sours, 31 Colo., 369, 410.

Later, the Colorado Supreme Court, when the question as to what the charter convention could constitutionally legislate upon was directly involved, affirmed the doctrine laid down in People ex rel. Elder, Etc., v. Sours, *supra*, and distinctly announced that the scheme of government contemplated was restricted to that of the municipality proper, and did not purport to nullify the Constitution or general laws of Colorado as to county or state government.

Mr. Justice Campbell, of the Colorado Supreme Court, in giving the unanimous opinion of the court in that case, says:

> "Neither is this revenue act of 1902 in violation of any provision of article XX. In the majority opinion of this court, in People ex rel. Sours, 31 Colo., 369; *it was clearly indicated that the general scheme of government therein contemplated is restricted to that of the municipality proper, and does not intrench upon county or state government.* It does not purport to nullify the Constitution or general laws of the state in so far as they pertain to county or state government, or attempt to interfere with the power of the state in raising state revenue."
>
> Parsons v. People, 32 Colo., 221, 240.

Again, the Colorado Supreme Court, in a still later case, holds in interpreting certain provisions of article XX of the Colorado Constitution and certain statutes passed in aid thereof, that: "*The city and county of Denver is still a county as well as a city,*"

and cites in support of this, the case of People v. Sours, *supra*.

> City Council of the City and County of Denver v. Board of Commissioners of Adams Co., 33 Colo., 1, 13.

This last case was one where Adams county sought to mandamus the city council of Denver to compel the latter to levy a tax to pay a certain claim arising by reason of the dismemberment of the old Arapahoe county, which had theretofore included within its county limits the city of Denver, and "the formation of three *new counties* out of its territory."

> Ibid., page 4.

All through the opinion in that case it is apparent that Denver is still a county. In addition, note the following quotations therefrom:

> "When these three measures went into effect, that which was formerly the county of Arapahoe, therefore, because three separate political subdivisions of the state, bearing the names just mentioned."

> Ibid., page 4.

> "We do not concede that this argument is valid, even if the city and county of Den-

ver *became a county* before Adams county was created."

Ibid., pages 11-12.

See, also,

McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 26.

Aichele et al. v. Chamberlain, 19 Colo., App., 17, 26.

One of the objections made to the constitutionality of article XX in the case of People ex rel. Elder, etc., v. Sours, *supra,* was that it violated section 4 of the enabling act (18 U. S. Stat. at L, 474), providing that the Constitution should be republican in form and should not be repugnant to the Constitution of the United States and that by reason of the amendment authorizing the charter convention to frame not only a charter of the city and county of Denver, which should not only be the charter, but the organic law thereof, that that displaced, and was intended to displace, the Constitution and the laws and the general assembly.

People ex rel. Elder, etc., v. Sours, 31 Colo., 383, 385.

But the Colorado Supreme Court held, as before stated, that if the amendment meant that, it could not be sustained.

And in Fire and Police Board case the same court held that the purpose of article XX was: "To give to the people of the new corporation as large a measure of *home rule in municipal affairs* as could be

granted under a republican form of government, which the state is obliged to maintain under its compact with the federal government, as evidenced by the enabling act."

People ex rel. Attorney General, v. Adams, 31 Colo., 476, 480.

The Colorado Court of Appeals had occasion, soon after the adoption of article XX of the Colorado Constitution, to pass upon the question as to whether the city council of Denver under the new scheme of government should canvass the vote as provided in the old charter, which was then in force until the new one should be adopted, or whether the general statutes of Colorado relating to the canvass of the vote for county elections were in force, and the court held that the provisions of the general statutes and not the charter, were in force, and said:

> "The duties of city officers are prescribed by the charter, and the duties of county officers by the general laws of the state. That the city government and the county government are in the hands of the same persons is immaterial. The distinction between the functions pertaining to a city government and those pertaining to a county government, is not, and does not purport to be, affected by the amendment. While the city and county of Denver is a city, it is also a county, and any election lawfully

held by its inhabitants is a county as well as a city election."

McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 24.

Aichele et al. v. Chamberlain, 19 Colo. App., 17, 24.

That opinion then goes on to quote a portion of the opinion of the Supreme Court of Colorado in the case of People ex rel Elder, etc., v. Sours, hereinbefore quoted, as showing "the character of the corporation which was created by the amendment," and adds:

"Article XIV of the Constitution provides for counties and county officers. By section 2 of the amendment, *the new corporation is made subject to the general provisions of that article, and of the state legislation enacted in pursuance of it; so that*, although a city, *it is a county* equally with any other legal subdivision of the state to which the Constitution and statutes have given the name of county * * * in so far as the functions of a city are to be exercised by the consolidated city and county, the charter and ordinances of the city are applicable to it; *but they can not be applicable to it when exercising the functions of a county.*"

McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 26.

It is most important to note that that opinion also draws the distinction between the word "*char-*

ter" as used in article XX and the word "*law*," holding the former to relate to municipal matters and the latter "to the public law of the state or sovereignty."

Ibid, pages 26-27.

See, also,

Airy v. People, 21 Colo., 144, 153.

This sustains my contention that the word "charter" as used in article XX must be construed in its ordinary meaning.

The purport of all these decisions, therefore, both of the Supreme Court and the Court of Appeals of Colorado, is uniformly to the effect that the charter convention was authorized under the Colorado Constitution to act *only* as to those matters *which were purely of local and municipal concern.*

I am aware that section 2 of article XX provides that "the officers of the city and county of Denver shall be such as by appointment or election may be provided for by charter." But this provision simply means that the people of Denver had the right to designate their own municipal or city officers and select them in their own way without state interference, and could have few or many such purely city officers, according to their wishes. So, too, they were thereby expressly given power to fix the term, jurisdiction, duties and qualifications of such purely city officers. While by a subsequent clause of the same section it was permitted to the charter convention to designate any charter officers who should perform the acts and duties required of county officers to be done by the Constitution or by the general law, this was in the nature of a reservation to the effect that the general

statutes and the Constitution of Colorado were still in force in Denver to the same extent as before the adoption of article XX. It was not a grant of power to a charter convention.

> People ex rel. Elder, etc., v. Sours, 31 Colo., 369, 387.
>
> McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17.

In other words, the charter convention can legislate absolutely and exclusively only as to matters relating to local or municipal affairs proper and which are not in conflict with the general statutes or Constitution.

But as the Court of Appeals of Colorado said:

> "The charter * * * can not be applicable to it when exercising the functions of a county."
>
> McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 26.

And while the court said that of the old charter while it was in force in the interim between the taking effect of article XX and the adoption of the present charter, yet the reasoning therefor makes it equally pertinent to the existing charter.

Judge Cooley in his work on Constitutional Limitations, says:

> "And the general disposition of the courts in this country has been to *confine*

municipalities within the limits that a strict construction of the grants of the powers in their charters will assign to them."

Cooley Const. Lim. (7th Ed.), 271.

See, also, page 565.

Again, he says:

"The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the state in local government. *The state can create them for no other purpose, and it can confer powers of government to no other end*, without at once coming in conflict with the constitutional maxim, that legislative power can not be delegated, or with other maxims designed to confine all the agencies of government to the exercise of their proper functions."

Cooley Const. Lim. (7th Ed.), 309.

That the charter can legislate only as to those matters which are distinctly municipal, is further borne out by section 6 of article XX of the Colorado Constitution, which provides that cities of the first and second class in Colorado are empowered to adopt by popular vote like charters framed by delegates.

If the charter of the city and county of Denver can constitutionally legislate as to county officers, the time of their election, the terms of their respective offices, and the jurisdiction of the courts, etc., in said city and county of Denver, then all charters of the

cities of the first and second classes, which charters may hereafter be framed, not by the general assembly, but by a local municipal charter convention, may properly legislate upon like subjects. We might, therefore have striking anomalies in Colorado in counties like Pueblo, El Paso Fremont and Boulder, where there are two or more cities of the first and second class, by having a sheriff, treasurer, or other county officers, so called, provided by the charter of one city and other like, but yet different, officers provided by the charter of another city in the same county, or to put it more strongly we might have a County or District Court with a jurisdiction, practice, powers, etc., defined by the charter of one city but different from the jurisdiction, practice, powers, etc., of the same County or District Court sitting within the terminal limits of another city in the same county. And this, too, notwithstanding the positive provision of the Constitution of Colorado that

> "All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally shall be uniform."
>
> Colo. Const., section 28, article VI.
>
> 1 Mills' Annotated Statutes of Colorado, section 400, page 276.

In short, we might have in such counties several sheriffs, treasurers, county clerks, etc., with varying

times of election, with varying terms of office, courts of the same class or grade with varying jurisdiction, powers and practice, all of which could be fixed and determined not under constitutional restraints and limitations, but according to the whims and fancies of the citizens of a municipality as embodied in a charter framed by a local charter convention of such respective cities in such counties and adopted by the local vote of the citizens of the particular municipality. Such an anomalous condition was never intended, but such is the anomaly in government which counsel for plaintiff in error construe into (I can not say out of) article XX of the Colorado Constitution in their effort to support their contention that the decision of the Supreme Court of Colorado was erroneous. In a somewhat similar case in Missouri, in which it was contended that St. Louis was intended under Missouri Constitution to be made different from other portions of that state, the Missouri Court of Appeals held that St. Louis was still a county, and any provision of its charter to the contrary was void, and said that "anomalies in the political system are not to be arrived at by construction."

State v. Finn, 4 Mo. App., 347.

Moreover, in article XX there is no express limitation upon the power of the general assembly to legislate in such manner as it sees fit, in accordance with the other provisions of the Constitution, as to the term, duties or jurisdiction of county officers. It would be doing violence to all rules of construction to hold that, by reason of there being granted by article XX to the citizens of Denver the right to frame a

charter for purely local municipal government, that charter, without, at least, an express provision in the Constitution authorizing it, could properly or constitutionally, legislate as to the matters affecting county and state government, or the policy of the state at large in reference to county and state affairs.

The general plan of the American system of government must always be kept in mind. As is well said by Cooley:

> "The American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, *and the general affairs only by the central authority.* * * * It is this, also, that impels the several states, as if by common arrangement, to subdivide their territories into counties, towns, road and school districts, and to confer powers of local legislation upon the people of each subdivision. * * * *The system is one which almost seems a part of the very nature of the race to which they belong.*"
>
> Cooley Const. Lim. (7th Ed.), 261, 263.

Again he says, referring to municipalities:

> "*They are governments of enumerated powers*, acting by delegated authority. * * * * The local authorities can exercise those (powers) only which are expressly or impliedly conferred, and subject to such

regulations or restrictions as are annexed to the grant."

Cooley Const. Lim. (7th Ed.), 266.

See, also,

Bernheimer v. Leadville, 14 Colo., 518, 520.

It is important to bear in mind the fundamental distinction between municipal corporations and counties. This was brought out very forcibly in the opinion of our Supreme Court in the original case upon the constitutionality of article XX (People ex rel. Elder, etc., v. Sours, 31 Colo., 269, 385-87), by Mr. Justice Steele, and also by Mr. Justice Campbell in the case of Parsons v. People, 32 Colo., 221, and again in the City Council, etc., v. Board of Commrs., etc., 33 Colo., 1, as well as by the Court of Appeals in the case of McMurray v. Wright, 19 Colo. App., 17.

In addition to what is said in the foregoing citations, I desire to call the court's attention to the following upon the same propositions:

"A municipal corporation * * * is invested with the power of *local* self-government. Quasi corporations on the other hand * * * are merely auxiliaries of the state."

Carpenter v. People, 8 Colo., 116, 125. 125.

Counties "are of a purely political character, constituting the machinery and essen-

tial agency by which free governments are upheld and through which for the most part their powers are exercised. Their functions are wholly of a public nature. Counties are subordinate agencies for the orderly government of the state within the scope of their authority; hence they *are subject to the control and direction of the legislature in which chiefly the sovereignty of the state is represented and exercised.*"

11 Cyc., 342, and cases cited.

"A *county is* a governmental agency or political subdivision of the state, *organized for the purpose of exercising some functions of the state government*, whereas, a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government."

11 Cyc., 342, note 11.

San Mateo Co. v. Coburn, 130 Cal., 631, 636.

Comrs. v. Mighels, 7 Oh. St., 110, 118.

"As in the case of private corporations, so also in the case of strictly municipal corporations, such as cities, there must be an acceptance of the charter, either express or implied. In this respect, they differ from public quasi-corporations. Cities are regarded as corporations created for their own benefit, while inhabitants of a district invested by

statute, *in invitum*, with particular powers, are made corporations without their consent. *One feature by which a city is distinguished from a county is in that the powers under a county government are conferred by the legislature, irrespective of the will of the inhabitants of the county;* whereas, the inhabitants of a city must determine whether they will accept the corporate powers offered them to be exercised by the officers of their own selection. In other words, municipal corporations proper are called into existence through the direct solicitation or by the free consent of the people who compose them. *Counties are the legal subdivisions of the state, created by the sovereign power of the state, of its own sovereign will*, without the particular solicitation, consent or concurrent action of the people who inhabit them. An act incorporating a municipality takes effect without acceptance, as an act; and yet, without organization thereunder, it would be a dead letter. The legislature may provide that any particular charter shall not take effect until accepted; and it can prescribe the way in which the acceptance shall be signified, as that it must be by a majority vote of the inhabitants."

1 Smith on The Modern Law of Municipal Corporations, section 76.

The following quotations from a leading case in California, upon the character of the government of

the city and county of San Francisco, sustain the views hereinbefore set forth.

While I think that the decisions of the Colorado Supreme Court heretofore cited and quoted, are amply sufficient to sustain our contentions, I cite these California, Missouri and Washington cases as corroborative of the views expressed by Colorado Supreme Court.

SOME CALIFORNIA CASES.

In Kahn v. Sutro, 114 Cal., 316 (33 L. R. A., 620, 623-7), it was said:

> "Section 1 of the act of April 19, 1856 (Stat., 1856, page 145), commonly known as the 'Consolidation Act,' by virtue of which the present corporate charter of San Francisco exists, declares: 'The corporation or body politic and corporate now existing and known as the city of San Francisco shall remain and continue to be a body politic and corporate in name and in fact by the name of the city and county of San Francisco,' etc. The effect of the legislative action was merely to continue, with extended boundaries and additional powers, the city of San Francisco, which had been incorporated in 1850; and, although the provisions of the charter were in many respects appropriate for a county, the corporation thus created remained a city, under a different name, *but the inhabitants of the territory thus brought under the provisions of the city charter were*

not invested with county government. People v. San Francisco City and County Supers., 21 Cal.,668; Wood v. San Francisco City and County Election Comrs., 58 Cal., 361.

* * * * * *

"In Staude v. San Francisco City and County Election Comrs., 61 Cal., 313, it was held that the provisions of section 4109 of the Political Code, as amended in 1881, by which the time for the election of city and county, as well as other officers throughout the state, was changed, were applicable to San Francisco, by virtue of the clause in section 6 of article XI, that 'cities or towns heretofore organized shall be subject to and controlled by general laws.' *It may therefore be regarded as settled by the decisions of this court that the city and county of San Francisco is a municipal corporation, and, in matters of government, is to be regarded as a city.* But, while the people of San Francisco are thus to be regarded as under a municipal government, with the right to select officers to execute the powers of that government according to the terms of its charter, the territory over which that government is exercised is at the same time a county; and for the purposes for which county officers exercise authority not derived from the charter, and disconnected with municipal government, its officers are properly termed 'county officers.' Considered in its political and judicial relations to

other portions of the state, the officers elected by its voters, to the extent that they exercise only such powers as are given by laws relating merely to counties, and who do not derive any of their authority from the charter, are to be regarded as county officers, as distinguished from city officers."

* * * * * *

"*San Francisco is, therefore, both a city and a county*, and although the boundaries of the two bodies corporate are coincident, the electors within this territory vote for officers whose authority and functions are derived exclusively from the charter of the city, and also for officers whose powers and duties are prescribed by general laws, and upon which the charter is silent. *It must follow from this that some of its officers are city officers, and others are county officers.* There is nothing unusual or inconsistent in this. The 'government' of the city is municipal, and the officers who are to exercise that government are municipal officers; *but the territory in which that government is exercised is still a part of the state, and, for all purposes other than municipal government, it is subject to its control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws*, or to perform such functions disconnected with the municipal government as may pertain to the government of the state. *It would not be contended, if the city was only a por-*

tion of the county, or if a county should be composed entirely of incorporated cities, that the state would be precluded from authorizing the election by the voters of the county of officers to carry out those provisions of its laws which pertain to the state at large, and which have no connection with municipal affairs, *and this rule is not changed where the county consists of a single city instead of several.* Although the same body of voters choose the different officers, the functions of the officers chosen by them are distinct in their nature, and *the character of the officers must be determined by the source of their authority and the functions they are to exercise.*"

* * * * * *

"The guaranty given to the city and county of San Francisco by the Constitution of the right to continue its government under the charter which it held at the adoption of that instrument until it shall adopt another, including the right given by that charter to change its officers every two years if it shall so elect, can not be taken away by the legislature under the form of imposing upon these officers certain functions exercised by county officers in other counties of the state, and fixing the term of such county officers at four years. But, as the territory thus placed under municipal government still remains a county, and is not taken out of the control of the state for all purposes not embraced within the scope of municipal government,

the authorization by the legislature of an election by the voters of that territory for officers to carry out these laws, does not make the persons so elected city officers. *The Constitution has declared that certain officials shall be elected within each county, and, if San Francisco is a county, the legislature* is authorized to provide for the election of these officers by its voters and *is not precluded therefrom by the fact that they are voted for by the electors of the municipality at the same time with the election of its municipal officers.*"

* * * * * *

"The district attorney, sheriff, county clerk, county recorder, coroner and public administrator are officers whose powers and duties are given by the county government act, or by other general laws, and do not derive any authority from the consolidation act, or exercise any function in the municipal government of San Francisco. *These officers are therefore county officers, and their term of office, as well as the time of their election, are those provided by the county government act.*"

The coroner of the city and county of San Francisco has been held to be a county officer and the general laws are just as applicable to him as to any other coroner in the state.

Kuhlman v. Superior Court, 122 Cal., 636.

SOME MISSOURI CASES.

It is also instructive to examine the decisions of the Supreme Court and of the Court of Appeals of Missouri, under somewhat similar constitutional provisions.

In St. Louis under the consolidation scheme of the city and county of St. Louis, the charter, when adopted, "became the organic law" and "took the place and superseded the charter of St. Louis and all amendments thereof and all special laws relating to St. Louis, inconsistent with such scheme."

State v. McKee, 69 Mo., 504, 506.

It was held by the Supreme Court of Missouri, that as the election of constables, who it held, were state officers and not municipal officers, was provided for by the general laws, an ordinance of the city of St. Louis passed after the consolidation, was unconstitutional and void, the court saying:

> "The constable is not a city officer. He is a state officer. His is an office created by general law for every township in the state and every ward in the city. He is a state officer in the same sense that sheriffs and clerks of courts of record are state officers and that judges of inferior courts are state officers, although they can only discharge the duties of their respective offices within a limited territory and not throughout the state."

State v. McKee, 69 Mo., 504, 508-9.

Another case held that while St. Louis is not by name a county nor within the limits of any county, it is, for many purposes, throughout the statutes, treated as a county.

State v. Dillon, 87 Mo., 487, 491.

From the same opinion we learn, that the county officers were elected at the general November election, while municipal officers were elected at another time, in April, the court stating, on page 490:

> "The city of St. Louis, in April of designated years, elects its municipal officers, among whom are the mayor and members of the city council. *These officers then elected are strictly city officers.*"

And on page 491, in the same opinion, the court says:

> "At the general November election there are elected within the corporate limits of the city various state officers generally designated county officers, i. e. public administrator, clerks of courts of record, recorder of deeds, sheriff, coroner and some others."

Another case in Missouri, held that the sheriff was still a county officer, using the following language:

> "The sheriff of St. Louis county is a state officer, differing in his functions in no essential from any other sheriff in the state. The rules of law generally applicable to

> sheriffs, apply to him, and he does not become a city officer because the territorial subdivision of the state, constituting his bailiwick, is called a city rather than a county."
>
> State v. Finn, 8 Mo. App., 341, 347.

This last quoted case also states that in all matters of local concern the people of St. Louis are governed by their charter.

> *Idem*, pages 350, 352.

In another case the Supreme Court of Missouri affirmed the case last cited and others to similar effect, and said:

> "While the city of St. Louis is strictly a municipal corporation, its territory is also a subdivision of the state, in which officers are elected to perform the functions of the state government, as distinguished from those pertaining to municipal government. Those officers are in no sense municipal officers. Their designation as officers of the city of St. Louis refers to their territorial jurisdiction, rather than to the governmental duties they perform. They are officers under the laws of the state and perform their duties within the city limits."
>
> State v. Bus., 135 Mo., 325, (33 L. R. A., 616, 619).

Under the Missouri decisions, the constitutional provisions authorizing cities like St. Louis and Kan-

sas City to frame their own charters, are held to imply the power to adopt a complete and harmonious system of local municipal government, but it has been again and again held by both the appellate court and the Supreme Court of that state, that such right to frame and adopt charters did not authorize them to change the policy of the state as declared by the Constitution or general laws.

In the case of Kansas City v. Oil Co., 140 Mo., 458, 471-2, the court said:

> "A charter is the organic law of a city in this state whether it emanate from the general assembly, or is framed and adopted by the people of the municipality by authority of the Constitution. Being a law for the government of the municipality, it is binding upon all courts, and it violates no principle of our government to say that the courts, when called upon must enforce these municipal laws unless they conflict with the Constitution, and are not in harmony with the Constitution and laws, and, as already said, mere differences in details do not render such laws inharmonious. So long as Kansas City under its special charter does not invade the province of general legislation, or attempt to change the policy of the state as declared in her laws for the people at large, it will not be held to be out of harmony with such laws, notwithstanding the provisions of the special charter may be different from the general statutes pre-

scribed for the government of other cities in their local affairs."

In the case of State v. Police Commissioners, 80 Mo. App., 206, 216, the court held that:

> "While much important governmental power concerning matters of strict municipal or local concern may be legally embodied in the charter, yet the charter must remain in subjection to the general law. This is constantly iterated by the Supreme Court in what are known as the Park cases. Kansas City v. Oil Co., 140 Mo., 458; Kansas City v. Ward, 134 Mo., 172; Kansas City v. Scarritt, 127 Mo., 642. In the Oil Company case it is said that whenever a charter so framed comes under judicial review the inquiry is, is it in harmony with and subject to the law of the state. *It is there further said that the charter must not invade the province of general legislation, or attempt to change the policy of the state.* In respect to all matters involving the relation of the city to the state and the full exercise of what is commonly known as the police power of the state, the act of legislature will annul provisions of such a charter on the same subject. St. Louis v. Dorr, 145 Mo., 466."

And on page 218 of the same opinion, the court said:

> "That the charter can not change the state law in this respect is apparent, unless we set up the charter as superior to the state law. To grant such potency to the charter, we would be brought to the position, as stated by the Supreme Court * * * that a wholly different system of police could be introduced by the city, or, indeed, none at all; and thus the policy of the state be subverted."

This case involved the question of certain charter provisions relating to the police, where by state law the metropolitan police system was in force, which law, the Supreme Court said, "makes a policeman an officer of the state as well as of the city."

Idem, page 219.

And then went on to say that

> "The law establishing the police commissioners and the system of police under them is an evidence of the policy of the state with reference to the police of one of its principal cities, and it can not be subverted by a local charter."

Again, the Supreme Court of Missouri, in a recent case, in speaking of the purposes of the constitutional provision to give St. Louis and other cities the benefit of home rule, just as was intended by article XX of the Colorado Constitution, says that:

> "Looking at these constitutional provisions, together, it is plain that it was the

purpose of the Constitution of 1875 to grant to St. Louis and other cities and localities the benefit of 'home rule,' so far as it was possible, but it was not intended to abdicate state sovereignty over them, nor to raise them higher in authority than the state of which they form a part."

State v. Lindell Ry. Co., 151 Mo., 162, 182.

SOME WASHINGTON CASES.

So, too, in the state of Washington cities of certain size have power to frame their own charters, but it was held that such charters could not provide for eminent domain proceedings, and the Supreme Court said:

"Because the Constitution permits certain cities to frame charters for their own government, is no sufficient reason for assuming a branch of the sovereignty of the state which has no element of municipal government in it, and the provisions of the charter must therefore be held to be void."

Tacoma v. State, 4 Wash., 64, 66.

These cases from California, Missouri and Washington (the three states other than Colorado where the state Constitution grants to cities the right to make charters), all show that the right to frame a charter, granted by the Constitution of a state to cer-

tain cities, is never construed to give them a right to infringe upon the power of the state as a whole, or to change the policy or scheme of state or county government, but that such charters are confined strictly to those matters which are distinctly municipal and of purely local concern.

The constitutional permission to municipal corporations to frame their own charters, therefore, does not give the right to the charter convention to legislate as to state or county officers, their election term of office, or jurisdiction, but only as to local or city officers and affairs. For example, such a constitutional provision does not permit a municipal charter convention to legislate as to the jurisdiction or duties of a state court, or to prescribe the manner in which a state court should transact its business. This was distinctly decided in the following Washington cases:

Fawcett v. Pritchard, 14 Wash., 604 (33 L. R. A., 674, 675-6).

Howe v. Barto, 12 Wash., 627.

SOME COLORADO CASES.

In Colorado the city council of Leadville attempted some years ago to confer certain powers upon the police judge, who had been elected under the authority conferred by the general statutes; they also attempted to prescribe the form of procedure, the general statute having failed to define his jurisdiction or powers or prescribe the procedure, but the Supreme

Court held that such ordinance was unconstitutional and void.

That case is interesting and instructive, because the question there involved was as to the power of the municipality to confer upon a court whose duties concerned the policy of the state at large and the general public any powers or jurisdiction whatever, or to legislate in any particular as to such court. That court, as are all courts under our Constitution, was a part of the judicial machinery of the state.

Moreover, in that case there was no express grant to the city council of Leadville to legislate as to the police magistrate's court; but it was argued that as the general statutes provided that a police magistrate should be elected by the electors of such a city, and were silent as to his jurisdiction and duties and the procedure of his court, therefore the power to define his jurisdiction, etc., was necessarily implied as vested in the city council of Leadville.

The reasoning in the decision of this court in that case is quite pertinent to the case at bar. The Colorado Supreme Court says:

> "We have already seen that, not being a justice of the peace, he could assume the authority of such an office only by usurpation, and certainly it can not be contended that the municipal authorities of Leadville can confer statutory powers upon an officer of their own election, for whom no statutory powers have been prescribed by the legislature, even although they may have been fully empowered by the statute to elect such officer merely.

"The city council possesses no lawful power to legislate for such purpose. And this consideration applies to the powers sought to be conferred upon the defendant by municipal ordinances."

* * * * * * * *

"After authorizing the appointment of police judge by the town council of cities of the second class, the legislature stopped short of conferring authority to go further. *An obvious reason for this is found in the constitutional provision already cited, requiring uniformity in the jurisdiction and practice of all courts of the state of the same grade or class.* Such an uniformity could not be made possible, were the local authorities of each town and city vested with the power of establishing courts, and prescribing the jurisdiction and practice of its judicial officers, each having a local and limited jurisdiction, each likely to be as distinct as the diverse character of the different towns for which they were created, and therefore necessarily *sui generis.*

"It can scarcely admit of doubt that all courts and judicial officers in contemplation of the Constitution are to be created, established, limited, and the exercise of their powers provided for by general law emanating from the legislative authority of the state. A popular but mistaken impression prevails to some extent, that all civil officers whose duties embrace municipal laws, ordi-

nances and regulations are purely local or municipal in their character, and have no general relation to the body politic of the state.

"*It must be borne in mind that there is a legal distinction between state officers, that is, officers whose duties concern the state at large, or the general public, although exercised within defined limits, and municipal officers strictly, whose functions relate exclusively to the particular municipality.*

" 'The administration of justice, the preservation of the public peace and the like, although confined to local agencies, are esentially matters of public concern, while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large.' Dillon on Municipal Corporations, sections 33, 34, 773."

* * * * * *

"It thus appears to be clearly established that the administration of justice, the preservation of the public peace, and the protection of the rights of the citizen, although confided to local agencies, are essentially matters of public concern, while the enforcement of municipal by-laws and regulations, as above illustrated, are matters which pertain to the municipal corporations merely as distinguished from the state at large.

"Under the construction we are constrained to put upon the Constitution and statute law of our state, and the application of the principles laid down in the authorities above cited, we are led to a conclusion that the office of police judge, as denominated in sections 2714 and 2790 of the General Laws, can only be established and fully equipped for service by the legislature of the state; that such officer is not the creature of the municipal authority of a city or town; that such municipal authority can not invest the office with any powers or functions of its own creation. It has no power to confer jurisdiction or prescribe a mode of practice and procedure for a court or any judicial officer, which can only be done by the express provision of general law, nor can it, in respect of a police judge created under the provisions of the statute referred to, clothe such officer in the habiliments of a justice of the peace, or any other judicial officer whose magisterial garb has been made by the legislature expressly for the latter's use."

People ex rel. Howell, etc., v. Curley, 5 Colo., 412, 418, 419-420, 421-422.

To the same effect see, also, the cases of

People v. Hurlburt, 24 Mich., 82.

Burch v. Hardwick, 30 Grat., 24.

AS TO TIME OF ELECTION.

The charter can not provide for a time of election of county officers different from that provided for those of other counties by the Constitution, for there is no express provision in article XX authorizing it to do so, nor is there any express statement in article XX showing that it was by that article intended to change for the city and county of Denver the time of the election or the beginning or ending of the terms of office for those officers who are properly designated as county officers. It is well settled that the Constitution should be construed as a whole to prevent conflict and harmonize the whole.

People ex rel. Livesay v. Wright, 6 Colo., 92, 95.

Lamborn v. Bell, 18 Colo., 346.

In re State Lands, 18 Colo., 359, 364.

People ex rel. Bentley et al. v. Le Fevre et al., 21 Colo., 218, 233.

The Constitution (section 8, article XIV, both formerly and as amended) does, however, expressly provide for the election of a county treasurer who shall be collector of taxes, and for the election of the sheriff, the coroner, the county clerk, superintendent of schools, the assessor and justices of the peace and constables, etc., placing the time of their election at the same time members of the general assemly are elected.

Colorado Constitution, section 8, article XIV.

3 Mills' Annotated Statutes of Colorado (Rev. Suppl.), section 483, page 37.

It requires no citation of authorities to show that with this express provision as to the time of election of county officers putting it at November of each biennial period, any act of the general assembly attempting to change the time of such election would be unconstitutional and void, and what the legislature can not do, the charter convention of the city and county of Denver certainly can not do.

The attempt, therefore, of the charter of the city and county of Denver to provide for the election of a county treasurer, sheriff, county assessor, justices of the peace, etc., on May 17, 1904, and to change the beginning and expiration of the terms of such officers, is unconstitutional and void. It has been held that an election held at a time not authorized by law is void.

Kimberlin v. State, 130 Ind., 120.

Brewer v. Davis, 9 Hump., 208.

State v. Washoe Co., 6 Nev., 104.

Boone v. State, 10 Tex. App., 418.

10 Am. and Eng. Ency. of Law (2nd Ed.), 679.

As an act of the legislature changing the time of an election as fixed by the Constitution is unconstitutional and void; *a fortiori* a municipal charter.

Smith v. Askew, 48 Ark., 82.

10 Am. and Eng. Ency. of Law (2d Ed.), 680 and 681.

Paine on Elections, section 310.

The election on May 17, 1904, therefore, being held at a time not authorized by the Constitution, was unauthorized and void.

PLAINTIFF IN ERROR ESTOPPED.

It is alleged in the complaint filed against the plaintiff in error in the trial court that he participated in the election of November 8, 1904, at which election the relator, Badgley, was his opponent (see Printed Transcript of Record, page 2), but, notwithstanding such participation in that subsequent election, he now, having been defeated, claims title to the office by virtue of the prior city election of May 17, 1904, and contends that the November election was without authority of law.

In Morris v. The People, 8 Colo. App., page 375, the court decided that an officer who participated in an election for a successor and is himself an unsuccessful candidate for re-election, should be estopped to claim that the election was held without authority of law. We quote from the opinion, page 380, as follows:

> "But the position taken by Morris in this litigation is at least equivocal. He submitted his claim to the office to the voters of the precinct, and they rejected it. He was a candidate against the relator; he took an active part in the election, and the result was unfavorable to him. He does not seem to have entered the contest with any intention of abiding the event unless it should be satisfactory to him. If he was successful, he could hold the office by virtue of the election. If he failed, he could repudiate the election and hold the office by virtue of his former commission, on the ground that no successor had

been legally chosen. The law does not regard a position like that with favor."

The plaintiff in error, Elder, having submitted his claim to the office of county treasurer to the voters at the election of November 8, 1904, is therefore under Colorado decisions estopped from disputing the validity of such election.

See, also,

People ex rel. v. Waite, 70 Ill., 25.

People ex rel. v. Moore, 73 Ill., 132.

AS TO THE SCHEME OF GOVERNMENT.

Counsel for plaintiff in error use a very considerable portion of their brief in an endeavor to show that the scheme of government which they support is not subversive of a republican form of government.

As I have before said, I do not regard that question as involved in this case. It is true that the Supreme Court of Colorado did, as a matter of argument, in the first case in which the construction of article XX of the Colorado Constitution was before it, say, in effect, that, if it were to be given the construction contended for by counsel for the respondent, Sours, it would be repugnant to the Constitution of the United States, and reiterated it in the case at bar.

People ex rel. Elder v. Sours, 31 Colo., 369, 385-7.

But in the above case the court expressly sustained the contention of counsel for petitioner, Charles S. Elder, and held that article XX must be construed

> "as a whole, in view of its expressed purpose, of securing to the people of Denver absolute freedom from legislative interference *in matters of local concern*."

and then added that,

> "*so considered and interpreted*, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States." Ibid., page 387.

In that case the plaintiff in error here, Charles S. Elder, was the petitioner and the real party in interest. The court sustained his contention that it was not unrepublican, and the respondent, Sours, did not bring that case to this court in error as involving a federal question. The decision in that case remains the law of the state of Colorado as to the construction of article XX of our state Constitution. It has not only not been reversed, but it has since been repeatedly affirmed by that court. First in 1904, in

> Parsons v. People, 32 Colo., 221, 240.

Again, in 1905, in

> People ex rel. Attorney-General v. Johnson (Colo. Sup. Court), 86 Pac. Rep., 233.
>
> People ex rel. District Attorney v. Elder (Colo. Sup. Court), 86 Pac. Rep., 250,

which latter case is the one in which we are now interested.

People ex rel. District Attorney v. Alexander (Colo. Sup. Court), 86 Pac. Rep., 249.

People ex rel. District Attorney v. Berger et al. (Colo. Sup. Court), 86 Pac. Rep., 250.

People ex rel. District Attorney v. Armstrong (Colo. Sup. Court), 86 Pac. Rep., 251.

People ex rel. District Attorney v. Rice et al. (Colo. Sup. Court), 86 Pac. Rep., 251.

People ex rel. District Attorney v. Lawson et al. (Colo. Sup. Court), 86 Pac. Rep., 251.

Byrne v. People ex rel. District Attorney (Colo. Sup. Court), 86 Pac. Rep., 250.

People ex rel. District Attorney v. Horan (Colo. Sup. Court), 86 Pac. Rep., 252.

In three other cases decided at the same term, in 1903, as the original case, it was affirmed in principle though without specific mention of the case by name.

People ex rel. Attorney-General v. Adams et al., 31 Colo. 476, 480.

It would seem, therefore, that the Supreme Court of Colorado had given full consideration to the con-

struction placed by it upon article XX in these repeated decisions.

The Court of Appeals of Colorado in a decision rendered after the case of People ex rel. Elder v. Sours, 31 Colo., 369, followed the same construction, and approved of the doctrine there announced.

McMurray v. Wright, Mayor, et al., 19 Colo. App., 17, 25.

If it were necessary to consider in this argument the question whether, if the construction now given by counsel for Mr. Elder to article XX were permitted, it would result in authorizing a form of government which would be unrepublican, we believe that we could conclusively demonstrate that it would be. Not only does the reasoning of the cases heretofore cited sustain us, but we could cite many more.

It will be conceded that under our form of government and laws the only body in which *plenary* power to legislate is reposed is the legislature of a state, and that is true only where there are no constitutional prohibitions. All legislative bodies, other than state legislatures, can legislate only upon those matters as to which they have been given authority, either by the Constitution, or by a statute authorized by the Constitution. Even the congress of the United States has only constitutionally enumerated powers.

The fact that a municipal corporation is created by constitutional grant, instead of by legislative grant, is wholly unimportant and does not clothe it in any of the attributes of sovereignity, or with any powers of greater scope than a legislative charter, save only that the legislature may not by statute diminish the

authority granted by article XX. That article is the measure of all authority in the municipality, is the source of its powers, it may not rise above that; and there is nothing in article XX that changes the cardinal rules of law relating to the interpretation of its provisions by the courts, confining the administrative and ministerial operations of the city within the strict letter of the article.

The surrender by the state of its control of government in any portion of the state, whether permanent or temporary, is intolerable in a republican form of government; and a local community, while it may be intrusted with powers of local self-government, may never be safely intrusted with sovereign powers.

Cooley Const. Lim. (7th Ed.), 69, 266, 271, 309, 400.

Ex parte Wall, 48 Cal., 279, 313-314.

If the charter of the city and county of Denver can legislate on state policies and matters for the territory comprised within its boundaries, freed from all control by the state, then Denver would be a state itself, possessed by the sovereign powers of a state, in other words, we should have within the outer boundaries of the state of Colorado a state called Denver, separate and apart and independent from our state of Colorado, organized and established in direct violation of article IV of the Constitution of the United States.

But, as I have before said, the Colorado Supreme Court did not give to article XX of the Colorado Constitution the interpretation claimed by plaintiff

in error, and did not hold that either article XX, or the charter of Denver framed under that article, was in conflict with the federal Constitution, but on the contrary held that the charter was in conflict with the Colorado Constitution, and that article XX (an amendment of that Constitution) did not grant to the city the powers claimed by plaintiff in error. The judgment of the Supreme Court of Colorado is not therefore subject to review.

CRITICISM OF CASES CITED BY PLAINTIFF IN ERROR.

In an endeavor to lessen the effect of the case of Kahn v. Sutro, 114 Cal., 316, quoted earlier in this brief, which authority was also cited by me in the court below, counsel refer, as they did below, to two subsequent cases in California, namely, Martin v. Board, 126 Cal., 404, and Crowley v. Freud, 132 Cal., 404. An examination of the California Constitution will show that, while certain cities in California have the constitutional right to elect members of a freeholders' convention, which convention may frame a local charter, that it is necessary after the charter has been submitted to the people and adopted by a majority of the votes cast at an election thereon that "*it shall thereafter be submitted to the legislature for its approval or rejection*," and that "if approved by a majority vote of the members elected to each house, it shall become the organic thereof," etc.

California Constitution, section 8, article XI.

This requirement that the charter shall be approved by the legislature, which represents the sovereignty of the state as to legislation, retains over any and all cities in California framing such charters the sovereign control of the state, and upon the approval of the legislature it becomes to all intents and purposes an act of the legislature.

That is essentially different from the position taken by counsel as to the Denver charter and as to the construction of article XX of the Colorado Constitution. These two California cases do not, therefore, sustain counsel's contention, for there the state still maintains its sovereign control over the charter and so over the municipality. But in Colorado counsel say that, although the charter adopted by the people of Denver does not have to be submitted to the legislature for approval or rejection, and although the legislature has no control over it, yet the charter may legislate as to county and state governmental affairs and policies within the boundaries of the city.

It took even in California an amendment to their Constitution expressly authorizing the charter to provide for the election of county officers before it could be done there. This is shown from the cases cited. But, even then, the state maintained its sovereign control over it, for that charter had to be approved by a majority vote of the members elected to each house of the legislature before it became the charter of the city.

But even in Crowley v. Freud, 132 Cal., 440, the latest case cited by counsel, although the amendment to the California Constitution granted express power

to the charter convention to embody in the charter provisions as to

> "the manner in which, times at which, and the terms for which the several county officers shall be elected or appointed, for their compensation and for the number of deputies that each shall have, and for the compensation payable to each of such deputies."

yet, as it did not expressly grant the power to the charter convention to embody in the charter what the qualifications of such deputies should be, the court held that the charter convention had no such power, and that, too, notwithstanding such charter had to be approved by the legislature before it would be in force.

So it is conclusively shown that the California cases cited by plaintiff in error do not sustain him.

The provisions of article XX of the Colorado Constitution are materially different from those of the California Constitution, in that the charters authorized by our Constitution do not have to be approved, or even submitted, to the legislature, and so can not, of course, ever be rejected by the legislature.

The Supreme Court of Colorado was therefore correct in holding that under our Constitution no city has the right to legislate as to matters affecting state or county officers, or state policies, or affairs, and that

> "even by constitutional amendment the people can not set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or

delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal or city government."

People ex rel. Elder v. Sours, 31 Colo., 369, 385.

Counsel for plaintiff in error next cite, on page 73 of their brief, the case of City of St. Louis v. Western Union Telegraph Co., 149 U. S., 465, and quote these two sentences from page 467 of the opinion:

> "The city is in a very just sense an '*imperium in imperio.*' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter."

An examination of that opinion discloses two things, (1) that this was said of those provisions of the charter of St. Louis which related to purely local and municipal affairs, namely, the control of the city over the streets of the city; and (2), that the general assembly of Missouri has "the reserved control" over the city and the charter adopted by it.

That is a very different condition from the case at bar, where the provisions of the charter of Denver involved do not relate to local or city affairs, but to county and state governmental matters; and, moreover, according to counsel's argument, there is no re-

served control existing in the general assembly of Colorado.

So far as relates to strictly city affairs, the city may be granted by the Constitution absolute freedom from legislative control, and so in that sense (which I understand was the sense in which the expression was used in the above case), the city might be an *imperium in imperio*. But when it comes to legislation by the charter of a city on state policies and state affairs, then such attempted legislation would be unconstitutional, for there can be no delegation to a municipality of the complete sovereign powers of the state. In such a sense an *imperium in imperio* can not be tolerated.

The decision above referred to does not sustain plaintiff in error.

Counsel next cite, at page 74 of their brief, the case of Bowman v. Lewis, 101 U. S. (11 Otto), 22, and quote two sentences therefrom. We are in harmony with the decision in that case, and with the reasons given for the judgment.

In that case the question was whether the Missouri Constitution, which established a Court of Appeals for the county of St. Louis and certain other counties, with final jurisdiction of cases where the amount involved was $2,500 or less, while suitors in other counties had the right to appeal to the Supreme Court of the state in such case, was a denial of the equal protection of the laws guaranteed under the fourteenth amendment to the Constitution of the United States. This court very correctly affirmed the judgment of the Supreme Court of Missouri, and said that

> "there is nothing in the [federal] Constitution to prevent any *state* from adopting any system of laws or judicature it sees fit for all or any part of its territory."

But this court did not say, and I think never will say, that where the Constitution of a state expressly requires, as does section 28 of article VI of the Colorado Constitution, that

> "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform,"

and where the Supreme Court of the state has, in interpreting that and other state constitutional provisions, held that no municipality of the state had power to legislate as to courts sitting within in the municipality and change the laws of the state in respect thereto, that such a decision by the state Supreme Court was erroneous, or that it raised a federal question. Such a question is one solely for the state court to decide. That is what the Colorado Supreme Court decided in the case of People ex rel. Attorney-General v. Johnson (86 Pac. Rep., 233), the opinion in which was made the basis of the decision in the case at bar, and is attached to and printed in the transcript of the record here. (See printed Transcript of Record, pages 21 to 32.)

It is apparent that Missouri has no such constitutional prohibition against local or special laws as to courts, but, on the contrary, their Constitution expressly and positively provided for them.

Counsel, at page 48 of their brief, refer to the case of Board of County Commissioners v. Rollins, 130 U. S., 662. We have no criticism of the rule of construction there announced. The Supreme Court of Colorado had not interpreted the constitutional provision there in controversy; the action was first instituted in the Circuit Court of the United States for the District of Colorado and the jurisdiction of the United States Court was invoked and attached by reason, evidently, of diversity of citizenship of the parties, and not on account of any federal question. Had the Colorado Supreme Court interpreted that section of the Constitution first, then, as no federal question was raised, this court would have held that it was bound by that construction. In the case at bar no federal question is involved, and this court has no jurisdiction to review the judgment—the interpretation by the Colorado Supreme Court of the particular constitutional provisions, and of the charter of Denver here involved must therefore control.

SOME GENERAL CRITICISMS OF COUNSEL'S ARGUMENT.

This brief has perhaps already been unduly extended, but the great importance of the questions involved on the merits of this controversy is my apology.

Counsel for plaintiff in error, in their brief here, do exactly what they, and other counsel for other parties, did in the court below—endeavor to draw a metaphysical distinction between "a function" and "a functionary." This distinction did not appeal to the Supreme Court, however, as it does not appeal to us. The function of an office does not exist merely in a name, as an abstract idea, but is an active, practical, exerted function; the agent exercising and executing it must in the nature of things exist, whether he be designated by the charter or not, else there is no state government within the territorial jurisdiction of the charter. Such an hiatus in the state government is permissible under counsel's construction, while under our construction it is impossible.

If opposing counsel's construction should be held to be correct, then upon failure by a charter convention to designate the officers in question there would be no such officers in existence, and the Constitution and statutes prescribing the jurisdiction and duties of county and state officers would be, within the limits of Denver, mere dead letters; in other words, there would be no state government in Denver. But under the construction given our Constitution by us, and the one sustained by the Supreme Court of Colorado, such a contingency is wholly impossible, because these offices and officers do and will continue to exist in every county of the state, Denver included. They exist in the city and county of Denver, whether designated by the charter or not, because they are created, not by the charter, but by the Constitution of the state.

Reliance is practically solely placed by counsel for plaintiff in error upon section 2 of article XX of

the Colorado Constitution, which they say makes an express grant of power to the framers of the charter to provide for the jurisdiction, term of office, duties and qualifications of *all* officers of or within the city and county of Denver, whether they perform purely city duties or state or county duties. But we say, in opposition to this, that this does not so provide, that counsel simply construe into the section the word "*all.*" Our contention is that this only refers to such officers of the city and county of Denver as are distinctly municipal in character and *as to such officers only* the charter may constitutionally legislate, that as to such officers the charter may make more or less in number than heretofore and may provide a different time of election and different term of office from that heretofore provided by the charters of Denver.

Indeed *opposing counsel practically concede* in their brief *that the charter can not fix or regulate the duties or acts of such officers as are commonly known as county officers* and that such an attempt on the part of the charter would be unconstitutional, but, they say, that this does not apply to the term of office or the time of election of such officers, and that the charter can constitutionally fix the term of office and the time of election of county officers so-called for terms different and times different from those provided by the Constitution for other counties.

In this connection we desire to call the court's attention to the fact that in section 3 or article XX, the officers of the city and county of Denver are practically classified into two groups; those officers whose duties are and always have been municipal purely are classified by themselves and those officers whose duties are and always have been distinctly governmental and

part of the county and state government are grouped and classified by themselves, for example:

> "The then mayor, auditor, council, etc., * * * shall *become respectively said officers* of the city and county of Denver and * * * the then clerk and ex-officio recorder, treasurer, assessor and coroner of the county of Arapahoe and the constables and justices of the peace, holding office within the city of Denver, shall *become respectively said officers* of the city and county of Denver * * * the foregoing officers shall hold the *said* offices as before specified only until their successors are duly elected and qualified *as herein provided for.*"

The words "*as herein provided for*" must be construed as referring to the entire Constitution. The municipal officers "as herein provided for," that is, as provided for in the Constitution, are in the city and county of Denver such as may be provided by the charter, and the county officers (who are distinctly made the same officers of the city and county of Denver and by this section made to hold until their successors are elected), "as herein provided for," are the county officers named in the Constitution, and whose election is provided for in the Constitution at the same time as all other county officers in other portions of the state. This section 3, therefore, distinctly recognizes the essential difference between municipal officers and county officers as still existing in the consolidated territories, and provides that municipal officers may be such, and their terms of office, etc., such

as may be provided in the charter, and that county officers shall be such, and their time of election, etc., such as provided by the Constitution and the general statutes. It is clear, therefore, that the charter provisions above referred to are unconstitutional.

We desire also to call attention to the last sentence in section 1 of article XX, which is that "the city and county of Denver shall alone always constitute one judicial district of the state."

If, then, opposing counsel's argument be sound that section 2 confers authority for the charter framers to provide a different scheme of government for the city and county of Denver from that required by the Constitution for other counties of the state, then because article XX provides that the city and county of Denver shall alone always constitute one judicial district of the state and also that the officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter it would give to the charter framers the power to legislate as to the district judges and district attorney, the time of their election, their jurisdiction and their duties, and the fact that other portions of the Constitution (Colorado Const., section 28, article VI) provide for a uniform system of courts and judicial procedure would not, according to their theory, make any difference. In short, carried to its logical conclusion, the argument of opposing counsel would permit the charter of the city and county of Denver to entirely change the judicial system of the state within the city and county of Denver, the number of judges of the district court, the number of district attorneys, fix a different time for their respective elections and a

different term for their respective officers, notwithstanding the express and mandatory provisions of section 28 of article VI of the Constitution.

If, as counsel contend, it be sufficient for the charter to simply designate certain officers who shall perform county and state functions, then what would become of the power of the state in its sovereign capacity to compel, under penalty of removal from office, the performance by its officers of either state or county duties? If the office does not exist by name, then there can be no removal from such office upon conviction for malfeasance, misconduct, oppression, embezzlement, etc., as provided *co nomine* in the case of county clerk, recorder, sheriff, coroner, constables, county commissioners, justices of the peace, county surveyor, county judge, county treasurer, assessor, etc., by 1 Mills' Anno. Stats., section 1303, and 2 Mills' Anno. Stats., section 3309. Nor can the assessor be removed by the governor, as provided by section 91, on page 90, of the Colorado session laws of 1902. Nor can the county treasurer be removed for failure to account for state revenue on the certificate of the state auditor, as provided by 2 Mills' Anno. Stats., section 3876; nor the county judge, justices of the peace, county clerk, sheriff, constables, etc., for taking reward for omission of duty, as provided by 1 Mills' Anno. Stats., 1302; nor the county treasurer for failing to pay over military poll tax, as provided by 2 Mills' Anno. Stats., section 3087.

If counsel for plaintiff in error are correct in their interpretation of our Constitution (the Supreme Court of Colorado has held, however, that they were not), then the state would be powerless to

compel the above named county officers to perform their state duties. Such an anomalous condition can not, of course, be permitted, at least, by construction.

Counsel say at page 50 of their brief that "the charter of the city and county of Denver must designate of its officers those who shall perform these duties," meaning county and state duties. But suppose it does not, what then? The charter convention can not be compelled to reconvene and designate such officers, for it has become *functus officio* the moment it has completed the charter, or the sixty-day constitutional limit of its session has arrived, and surely after the people have voted on the charter. The electors of the city and county of Denver can not be compelled in any judicial proceeding to designate such officers, and so the sovereign state is helpless, according to counsel's theory. It will not do to say that no charter convention would fail to designate such officers, for we know that the present charter, under which plaintiff in error claims, failed to designate any officer to perform more than twenty (20) duties required to be performed by county clerks under the general laws, and that at least twenty such duties are not assigned to any official under the present charter. Among the most important of these are: The issuing of marriage licenses (2 Mills' Anno. Stats., section 2992; 3 Mills' Anno. Stats., Rev. Suppl., section 2992); the authentication of a justice's execution to another county (2 Mills' Anno. Stats., section 2671); the authentication of a judgment of a justice when it is to be used as evidence to another county (1 Mills' Anno. Stats., section 1747); the approval of bonds of notaries public (2 Mills' Anno. Stats., section 3282); the giving of notices of the meeting of the county board

of equalization (2 Mills' Anno. Stats., section 3825); the distribution of copies of the Session Laws (2 Mills' Anno. Stats., section 3675); the reporting after a session of a legislature the number of persons entitled to laws (2 Mills' Anno. Stats., section 3677); certification of list of jurors to clerk of District Court (3 Mills' Anno. Stats., Rev. Suppl., section 2603); distribution of blanks of state board of health (3 Mills' Anno. Stats., Rev. Suppl., section 3602); filing for public inspection all the legislative journals (3 Mills' Anno. Stats., Rev. Suppl., section 2073b); receiving of claims of citizens against foreign corporations (3 Mills' Anno. Stats., Rev. Suppl., section 499), and numerous others.

I have not had the time to examine the omissions in the present charter of the duties of other officers, but these serve to illustrate the danger and to expose the fallacy of counsel's argument.

AS TO THE JUDGMENT ON DEMURRER.

It should be remembered that this proceeding was instituted in the trial court below under chapter 27 of the Colorado Code of Civil Procedure (Mills' Anno. Code, section 289), which provides three ways in which an action for usurpation of an office may be brought.

The section referred to is as follows:

> "An action may be brought by the district attorney in the name of The People of the State, upon his own information, or upon

> the relation and complaint of a private party, against any person who usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, or any franchise within his district in the state, and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held, or exercised by any person, or when he is directed to do so by the governor, and in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party upon his own relation, in the name of The People of the State."

This case was brought under the second class by the district attorney, upon his own information and the relation of a private individual, who claims to be entitled to the office.

There are, therefore, three parties interested in this action, namely, the People of the state of Colorado, suing through their regularly constituted prosecuting officer, the district attorney, for a judgment of ouster to remedy a public wrong, and also the private relator and plaintiff, Badgley, seeking in addition to the judgment of ouster, a judgment declaring him entitled to the office alleged to be usurped, and the third party is the defendant, the plaintiff in error, against whom both the People and the private relator seek judgment and relief. The People, even in a Code proceeding, when suing in the sovereign capacity of

the state, as is the case here, do not have the burden of proof, but the burden both in pleading and in proof as against the People is upon the defendant or respondent, and to that extent the old common law procedure of pleading and practice still prevails.

People ex rel. Saunier v. Stratton et al., 33 Colo., 464, 466.

Lyons & E. P. Co. v. People, 29 Colo., 434, 436.

High's Ext. Legal Rem. (3rd Ed.), section 712.

As against the People, therefore, even under the Code, the defendant must justify and establish his own title to the office, for

> "when the information is filed by the state upon the relation of the person claiming to be injured by the usurpation, the relator joining with the state, if the pleading show a good cause of action in favor of the state, a demurrer will not be sustained because it does not appear that the relator is not entitled to the office."

High Extra. Legal Rem. (3rd Ed.), section 713, page 670.

State v. Palmer, 24 Wis., 63.

This he did not choose to do, but demurred to the complaint, thereby making his justification upon the law based upon the admitted facts alleged in the complaint.

The Supreme Court was therefore right in reversing the judgment of the District Court, which sustained the demurrer and dismissed the complaint, and as the questions involved were purely those of law relating to the construction of the Colorado Constitution, the Supreme Court entered final judgment in favor of the defendants in error here.

IN CONCLUSION.

We submit that as the Supreme Court of Colorado in passing upon the questions herein involved merely interpreted the Constitution of its own state, harmonizing all of its various provisions, and that, though in so doing it did argumentatively refer to the federal Constitution and the enabling act of congress, yet no federal question is necessarily involved, and that if there is, there was other matter adjudged broad enough to sustain the judgment, and, further, that as the judgment was manifestly correct, it should be affirmed.

Respectfully submitted,

HENRY J. HERSEY,
Counsel for Defendants in Error.